No. 03-969

Supreme Court, U.S.
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In The
Supreme Court of the United States

KATHLEEN BROCKMAN,

Petitioner,

v.

WYOMING DEPARTMENT OF FAMILY SERVICES, and GLENNDA LACEY, LES POZSGI, MERIT THOMAS, ROBERT D. KUCHERA, SHIRLEY R. CARSON, and DANA WARD, each individually and in his/her official capacity with the Wyoming Department of Family Services,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF FOR THE RESPONDENTS IN OPPOSITION

PATRICK J. CRANK
Attorney General

JOHN RENNEISEN*
Deputy Attorney General

DAVID L. DELICATH
Assistant Attorney General

WYOMING ATTORNEY GENERAL'S OFFICE
123 Capitol Building
Cheyenne, WY 82002
(307) 777-5457

*Counsel of Record

Attorneys for Respondents

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

I. Did the Tenth Circuit Court of Appeals correctly hold that the Family and Medical Leave Act is not expressly or impliedly inconsistent with the common-law principle of collateral estoppel?

II. Would the state courts of Wyoming afford preclusive effect to the findings of the Wyoming Office of Administrative Hearings?

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ARGUMENT

This Court has recognized generally that federal courts must give preclusive effect to the factual findings of state administrative agencies acting in their judicial capacity. *University of Tennessee v. Elliot*, 478 U.S. 788, 798, 106 S.Ct. 3220, 3226 (1986). The Court also articulated two exceptions to that general rule. It does not apply if (1) Congress has expressly or impliedly created an exception within a statute that forms the basis for the action, or (2) the agency's findings would not be preclusive in state court. *Id.* at 795, 799.

Issue I

In the Family and Medical Leave Act, Congress did not expressly or impliedly create an exception to the general rule of preclusion.

Petitioner contends that the factual findings of the Wyoming Office of Administrative Hearings (OAH) are not entitled to preclusive effect in federal court because the Family and Medical Leave Act (FMLA) includes an implied exception to the general rule of preclusion. In support of that contention petitioner cites this Court's decision in *Astoria Federal Sav. and Loan Ass'n v. Solimino*, 501 U.S. 104, 111 S.Ct. 2166 (1991). In *Astoria*, this Court held that in Age Discrimination in Employment Act (ADEA) cases, federal courts should not afford preclusive effect to findings of state administrative agencies. *Id.* at 110-11. Although ADEA does not expressly limit the preclusive effect of agency findings, this Court determined that its filing requirements are inconsistent with preclusion:

> Section 14(b) requires that where a State has its own age-discrimination law, a federal Age Act

> complainant must first pursue his claim with the responsible state authorities before filing in federal court. 29 U.S.C. § 633(b); *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 99 S.Ct. 2066, 60 L.Ed.2d 609 (1979). It further provides that "no suit may be brought under [the Age Act] before the expiration of sixty days after proceedings have been commenced under the State law, unless such proceedings have been earlier terminated." The deadline for filing with the EEOC likewise refers to the termination of prior state administrative action, § 7(d)(2) providing that where § 14(b) applies "[s]uch a charge shall be filed . . . within 300 days after the alleged unlawful practice occurred, or within 30 days after receipt by the individual of notice of termination of proceedings under State law, whichever is earlier." 29 U.S.C. § 626(d)(2). Both provisions plainly assume the possibility of federal consideration after state agencies have finished theirs.

Id.

The FMLA shares none of the filing requirements that shaped this Court's decision in *Astoria*. It does not require complainants to exhaust, or even begin, state proceedings before filing suit in federal court. Further, the FMLA contains no deadlines tied to state proceedings. Thus, the *Astoria* holding with regard to the ADEA is completely distinguishable from the case at hand. Accordingly, the Court of Appeals was correct in its holding that the general rule of preclusion is applicable to federal suits under the FMLA.

Issue II

Wyoming State courts would give preclusive effect to the findings of the Office of Administrative Hearings.

Petitioner also relies on *Kosakow v. New Rochelle Radiology Associates, P.C.*, 274 F.3d 706 (2nd Cir. 2001) for support. In *Kosakow*, the 2nd Circuit Court of Appeals expressly stated that the FMLA contains no indication that Congress intended to limit the preclusive effect of state administrative agency findings of fact. *Id.* at 729. Accordingly, the court applied state law to ascertain whether the state agency findings would have preclusive effect in New York's state courts. The court determined the agency finding would not be preclusive in state court because the complainant did not have an opportunity for discovery or a hearing. Application of *Kosakow* to the case at hand shows that the OAH findings are preclusive in federal court if they would be preclusive in Wyoming's state courts.

The Wyoming Supreme Court has identified four factors for consideration in determining whether the factual findings of a state administrative agency, acting in a judicial capacity, are preclusive in state court:

> (1) whether the issue decided in the prior adjudication was identical with the issue presented in the present action; (2) whether the prior adjudication resulted in a judgment on the merits; (3) whether the party against whom collateral estoppel is asserted was a party or in privity with a party to the prior adjudication; and (4) whether the party against whom collateral estoppel is asserted had a full and fair opportunity to litigate the issue in the prior proceeding.

Kahrs v. Bd. of Trs. for Platte County Sch. Dist. No. 1, 901 P.2d 404, 406 (Wyo. 1995). The District Court and the Court of Appeals both applied that test to the case at hand and correctly held that the OAH findings would be preclusive in state court.

Petitioner repeatedly implies that she did not have a full and fair opportunity to litigate in the OAH because she was denied the benefit of discovery. [Petition at pages 2, 6, 7, 8]. That implication is patently false. The OAH sent a Docketing Notice to Petitioner and her attorney on March 9, 1999, giving notice of the issues to be decided. At any time, Petitioner could have begun discovery pursuant to Wyo. Stat. § 16-3-107(g), which provides in relevant part: "In all contested cases the taking of depositions and discovery shall be available to the parties in accordance with the provisions of Rules 26, 28 through (excepting rule 37(b)(1) and 37(b)(2)(D) therefrom) of the Wyoming Rules of Civil Procedure. . . ." The OAH rules also incorporate the discovery rules from the Wyoming Rules of Civil Procedure. Rules for Contested Case Practice and Procedure Before the Office of Administrative Hearings, Chapter 2, Section 9. Even if Petitioner and her attorney did not realize that discovery was available to them, the OAH's July 23, 1999 Order Setting Hearing, Requiring Disclosure and Setting Prehearing Conference provided a reminder by ordering that discovery was to be completed by September 8, 1999. The OAH's September 16, 1999 Order Vacating and Resetting Hearing Date extended that discovery deadline to November 30, 1999. Thus, Petitioner was afforded more than eight months to complete discovery and should not be heard to complain otherwise.

CONCLUSION

The decision of the Court of Appeals correctly interprets the FMLA and is consistent with this Court's precedent. Accordingly, the Respondents respectfully request that this Court deny the Petitioner's Petition for Writ of Certiorari.

Respectfully submitted,

PATRICK J. CRANK
Attorney General
JOHN RENNEISEN*
Deputy Attorney General
DAVID L. DELICATH
Assistant Attorney General
WYOMING ATTORNEY GENERAL'S OFFICE
123 Capitol Building
Cheyenne, WY 82002
(307) 777-5457

Counsel of Record
Attorneys for Respondents

January, 2004

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Wyo. Stat. § 16-3-107(g)

In all contested cases the taking of depositions and discovery shall be available to the parties in accordance with the provisions of Rules 26, 28 through 37 (excepting Rule 37(b)(1) and 37(b)(2)(D) therefrom) of the Wyoming Rules of Civil Procedure in effect on the date of the enactment of this act and any subsequent rule amendments thereto. All references therein to the "court" shall be deemed to refer to the appropriate "agency"; all references to the use of the subpoena power shall be references to subsection (c) of this section; all references to "trial" shall be deemed references to "hearing"; all references to "plaintiff" shall be deemed references to "a party". If a party or other witness refuses to be sworn or refuses to answer any question after being directed to do so by the agency in which the action is pending, the refusal to obey the agency order shall be enforced in the same manner as is provided in subsection (c) of this section.

Rules for Contested Case Practice and Procedure Before the Office of Administrative Hearings, Chapter 2, Section 9

Discovery. Unless otherwise prohibited by law, discovery shall be available to the parties in accordance with the provisions of Rules 26, 28 through 37 [excepting Rule 37(b)(1) and 37(b)(2)(D)] of the Wyoming Rules of Civil Procedure. Discovery requests, answers and deposition notices are not to be sent to this Office.